

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEON FREDERICK SMITH,

Defendant.

Case No.: 2:11-cr-00442-GMN-GWF-2

**ORDER**

**(ECF No. 117)**

Before the Court is the Government's Rule 404(b) Notice (ECF No. 117), the Government's Sealed Supplement (ECF No. 125), and Defendant's Response (ECF No. 126).

In its Notice, the Government advises counsel of its intent to introduce evidence of Defendant's prior criminal history noting the following five (5) convictions in Defendant's criminal history:

1. On April 4, 2004, in Nevada, for Attempted Grand Larceny, for which Defendant was apprehended as he was leaving the scene;

2. On November 3, 2004, for felony Burglary, in Nevada, whereby Defendant was caught in the act, and subsequently apprehended;

3. On November 23, 2004, in Nevada, for Attempt Invasion of the Home, for which Defendant was apprehended following an investigation that revealed Defendant's fingerprints in a getaway vehicle;

4. On March 14, 2005, for Attempt Possession of Stolen Vehicle, in Nevada, for which Defendant was apprehended inside the home of an unrelated third-party following a hit and run incident;

5. On February 20, 2010, for Obstruction, in Nevada, whereby Defendant was

1 apprehended for providing false information to police.

2 (Notice, 4:5-14, ECF No. 117.)

3 However, the Government later filed a Sealed Supplement (ECF No. 125) clarifying that  
4 it intends only to offer as Rule 404(b) evidence the Defendant's 2004 conviction for Attempted  
5 Invasion of the Home and 2005 conviction for Attempted Possession of Stolen Vehicle in its  
6 case-in-chief.<sup>1</sup> In its Response, the Defendant argues there is no indication that these two prior  
7 convictions demonstrate knowledge that would tend to prove any elements of the offense for  
8 which he is charged – Accessory After the Fact: 1) knowledge an offense against the United  
9 States had been committed by Mr. Jackson; or, 2) that Mr. Smith aided Mr. Jackson in evading  
10 arrest. (ECF No. 126.)

### 11 **Admissibility Pursuant to Rule 404(b)**

12 The Ninth Circuit has adopted a four-part test to determine whether to admit evidence of  
13 bad conduct for one of the purposes identified in Rule 404(b). The evidence must: “(1) be  
14 relevant to a material element of the offense; (2) be similar to the charged conduct; (3) be based  
15 on sufficient evidence; and (4) not be too remote in time.” *United States v. Howell*, 231 F.3d  
16 615, 628 (9th Cir. 2000); *see also United States v. Montgomery*, 150 F.3d 983, 1000-01 (9th  
17 Cir. 1998).

### 18 Materiality and Similarity

19 The similarity prong of the Ninth Circuit's test is a “factor pertinent to rational appraisal  
20 of the probative value of the evidence in relation to the purpose for which it is being offered.”  
21 *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1326 (9th Cir. 1992); *see also United States*  
22 *v. Vizcarra- Martinez*, 66 F.3d 1006, 1018 n.5 (9th Cir. 1995) (recognizing the “similarity  
23 inquiry as a means to assess the relevance and probative value of the evidence”). To establish

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25 <sup>1</sup> The Government advises it does not seek to admit the Defendant's 2011 conviction for suspected burglary .

1 similarity, therefore, “the government must prove a logical connection between the knowledge  
2 gained as a result of the commission of the prior act and the knowledge at issue in the charged  
3 act.” *United States v. Mayans*, 17 F.3d 1174, 1181-82 (9th Cir. 1994).

4 As the defense points out, the “Government must articulate precisely the evidential  
5 hypothesis by which a fact of consequence may be inferred from the other acts evidence.” *Id.* at  
6 1181 (citation omitted). In cases where the Government seeks to prove knowledge, it must  
7 prove a logical connection between the knowledge gained from commission of the prior act and  
8 the knowledge at issue in the charged act. *U.S. v. Garcia-Orozco*, 997 F.2d 1302, 1304 (9th Cir.  
9 1993).

10 Here, the Government offers the evidence to establish knowledge and absence of  
11 mistake. The Court agrees that these are both material elements of the offense of Accessory  
12 After the Fact. To establish that the Defendant committed the crime of Accessory After the  
13 Fact, the Ninth Circuit Model Criminal Jury Instructions state as follows:

#### 14 5.2 ACCESSORY AFTER THE FACT

15 The defendant is charged with having been an accessory after the fact to the crime of  
16 [specify crime charged]. In order for the defendant to be found guilty of that charge, the  
17 government must prove each of the following elements beyond a reasonable doubt:

18 First, the defendant knew that [name of principal] had committed the crime of [specify  
19 crime charged]; and

20 Second, the defendant assisted [name of principal] with the specific purpose or design to  
21 hinder or prevent that person’s [apprehension] [trial] [or] [punishment].

22 9th Cir. Manual of Model Crim. Jury Instructions, 5.2 (2010). Furthermore, the  
23 commentary suggests that “the jury should be instructed that the accessory after the fact must  
24 act with the ‘specific purpose or design’ to hinder or prevent the principal’s apprehension, trial  
25 or punishment.” *Id.* (citing *United States v. Mills*, 597 F.2d 693, 697 (9th Cir.1979)).

1 In this case, the Government argues the “inference drawn from Defendant’s criminal  
2 history, (is) that he was uniquely qualified to assist Mr. Jackson avoid apprehension after the  
3 bank robbery.” (ECF No. 117 at 4, ll. 22-24.) However, the Defendant asserts that the ‘unique’  
4 knowledge attributed to him by the Government is actually very general common sense  
5 knowledge. (ECF No. 126 at 7-8.) Proof of relevance at a general level is not sufficient for the  
6 purposes of proving a logical relationship between the specifics of the prior acts and the offense  
7 charged. *Mayans*, 17 F.3d at 1182.

#### 8 **2004 Conviction**

9 The Government specifically claims evidence of the Defendant’s 2004 conviction  
10 demonstrates his knowledge that any fingerprint evidence Mr. Jackson left behind could lead to  
11 his apprehension. (ECF No. 125 at 4, ll. 9-16.) The Government explains that the Defendant  
12 was previously convicted, in part, because he left his fingerprints on an abandoned vehicle and  
13 that this particular lesson learned is probative because it demonstrates that when Mr. Jackson  
14 arrived at his residence, he knew to take the coin tray and deposit ticket, which both contained  
15 Mr. Jackson’s fingerprints, and hide it behind the washing machine to prevent Mr. Jackson’s  
16 apprehension. (ECF No. 125 at 4, ll. 11-14.)

17 The Court finds that under *Mayans* and progeny, the Government has articulated  
18 precisely the evidential hypothesis by which a fact of consequence may be inferred from the  
19 other acts evidence. The Government has furnished the specific link between the knowledge  
20 gained when the Defendant was apprehended in 2004 with the use of fingerprints and the  
21 knowledge at issue in the present case. This circumstance of his prior conviction regarding the  
22 use of fingerprints is sufficiently similar to the facts presented in his current case. The  
23 knowledge the Defendant gained from his 2004 conviction, the lesson learned about the  
24 importance of not leaving fingerprints, furnishes a permissible inference/link that the Defendant  
25 was drawing upon this knowledge and assisting Mr. Jackson when he took items Mr. Jackson

1 had touched likely leaving fingerprints upon them and hid these same items behind the washing  
2 machine to prevent his arrest.

### 3           **2005 Conviction**

4           The Government also claims evidence of the Defendant's 2005 conviction demonstrates  
5 Defendant's knowledge that: (1) the residence of an unrelated third-party does not offer a  
6 secure refuge when attempting to avoid apprehension; and (2) having a secure refuge would  
7 increase the likelihood of avoiding apprehension following a criminal incident. (ECF No. 125  
8 at 4, ll. 1-4.) Defendant randomly sought refuge in someone's home when he fled police after  
9 the 2005 hit and run incident; however, the homeowner began screaming and the Defendant  
10 was apprehended. Defendant's knowledge gained as a result of having been apprehended  
11 inside the home of a stranger provides a permissible basis for the jury to find the Defendant was  
12 calling upon this specific knowledge or lesson learned and acting upon on it when he provided  
13 Mr. Jackson refuge. His prior experience reveals his instant conduct to be of similar design or  
14 purpose.

15           The Government also claims evidence of the specific circumstances regarding the 2005  
16 conviction demonstrates absence of mistake because it makes less probable Defendant's  
17 assertion that Mr. Jackson randomly appeared at the apartment after the robbery. (ECF No. 125  
18 at 5, ll. 5-6.) Rather, evidence from the 2005 conviction corroborates Mr. Jackson's statement  
19 that he told the Defendant "a few days before the robbery he wanted to rob a bank" and the  
20 Defendant remarked he "would get caught and didn't take him seriously." The Government  
21 also claims evidence of the 2005 conviction demonstrates that the Defendant knew the value of  
22 a safe refuge to avoid apprehension when he admitted he received \$700.00 from Mr. Jackson  
23 after the robbery as payment for allowing him to retreat into his residence.

24           As the court in *Mayans* indicated, proof of relevance at a general level is not sufficient  
25 for the purposes of proving a logical relationship between the specifics of the prior acts and the

1 offense charged. *Mayans*, 17 F.3d at 1182. However, there does exist a logical connection  
2 between the specific knowledge the Defendant gained from the circumstances resulting in his  
3 prior conviction and the subsequent knowledge of the Defendant at issue in this case. The  
4 Government has provided the specific link. The jury could find it was this prior knowledge or  
5 lesson learned that the Defendant exercised. This would satisfy both the knowledge element as  
6 well as demonstrate absence of mistake regarding the second element of the instant offense:  
7 that he received, relieved, comforted, or assisted Mr. Jackson in order to hinder or prevent his  
8 apprehension, trial or punishment. *See* 18 U.S.C. § 3 (2012).

### 9 **Sufficiency**

10 A conviction, rather than simply an arrest, is needed to prove that a defendant committed  
11 the act. *Accord United States v. Vo*, 413 F.3d 1010, 1018 (9th Cir. 2005) (finding that a  
12 conviction left no question as to the sufficiency of the evidence). Evidence of a prior  
13 conviction is sufficient proof that a defendant committed the crime. *See Howell*, 231 F.3d at  
14 628; *see also United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993). That  
15 Defendant was convicted is sufficient proof that he committed the prior acts. *See Howell*, 231  
16 F.3d at 628.

### 17 **Remoteness**

18 To be admissible pursuant to Rule 404(b), a conviction must not be too remote in time.  
19 *U.S. v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9th Cir. 2004). With regard to the fourth  
20 factor, Defendant's previous convictions are not so remote in time so as to prevent  
21 admissibility. "The Ninth Circuit has had held that offenses more than 10 years old are not too  
22 remote in time for purposes of admission under Rule 404(b)." *See Garcia*, 730 F.Supp.2d 1159,  
23 1173 (C.D. Cal. 2010); *see also U.S. v. Johnson*, 132 F.3d 1279, 1283 (9th Cir. 1997)  
24 (permitting admission of 13 year-old acts); *U.S. v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989)  
25 (affirming admission of 13 year-old prior act); *U.S. v. Spillone*, 879 F.2d 514, 519 (9th Cir.

1 1989) (concluding 10 year-old conviction was not too remote). Evidence of Defendant's  
2 criminal history, therefore, remains admissible despite having occurred over a span of  
3 approximately 10 years. Accordingly, the evidence satisfies the fourth factor.

#### 4 **Admissibility Pursuant to Rule 403**

5 It is important to note that evidence of Defendant's conviction, without more, does not  
6 support the inference that Defendant made his apartment available to Mr. Jackson knowing he  
7 had committed the robbery and hid items bearing Mr. Jackson's fingerprints all to assist Mr.  
8 Jackson to evade capture. Rather, it is the specific circumstances of each of the two prior  
9 convictions which is probative of the Defendant's knowledge and lack of mistake. Thus, it is  
10 important to weigh the probative value of this evidence against its prejudicial effect upon the  
11 jury. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988); *see also Mayans*, 17 F.3d at  
12 1183. Under Rule 403, no evidence may be admitted if its probative value is substantially  
13 outweighed by the danger of unfair prejudice to the defendant. Fed. R. Evid. 403.

14 The Court finds that the specific evidence regarding only the relevant circumstances of  
15 the prior offense as referred to *supra*, (e.g., the discovery of the defendant's fingerprints on a  
16 vehicle leading to his arrest/conviction and his unsuccessful attempt to escape into the home of  
17 a stranger leading to his arrest/conviction, etc.) outweighs the danger of unfair prejudice.  
18 However, the Government will have to tread lightly and not elicit any further information about  
19 the two prior offenses which is not similar to the charged conduct or relevant to a material  
20 element of the offense of Accessory After the Fact. Furthermore, the Court finds it is necessary  
21 to provide a limiting instruction to the jury to minimize the risk that they will view the  
22 defendant's prior convictions as indicative of a propensity to commit a crime. The parties are  
23 advised to offer appropriate language to the Court to be read during trial after the evidence has  
24 been elicited.

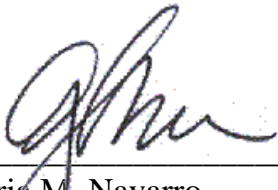
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1 **CONCLUSION**

2 In this case, both convictions indicate Defendant's familiarity with methods of  
3 apprehension which are sufficiently similar to the circumstances presented here. In relation to  
4 the 2004 conviction, the Defendant was apprehended when his fingerprints were discovered on  
5 an abandoned vehicle, and in relation to the 2005 conviction, he was apprehended after seeking  
6 refuge from police inside a stranger's residence. In the instant case, it is alleged that the  
7 Defendant provided refuge to Mr. Jackson and hid items touched by him in an effort to prevent  
8 fingerprint evidence. Furthermore, these specific circumstances of the prior convictions are  
9 relevant to a material element of the offense, knowledge and absence of mistake. Both courses  
10 of conduct alleged each led to a conviction, therefore sufficiency is established and neither the  
11 2004 nor the 2005 offenses are too remote in time.

12 The probative value is high and a limiting instruction providing that the evidence may be  
13 considered only for the limited purpose of assessing Defendant's knowledge, plan, and absence  
14 of mistake will mitigate any prejudice and direct the jury to use the evidence only for its proper  
15 purpose. See *Huddleston v United States*, 485 U.S. 681, 691-92 (1988). For these reasons, the  
16 Court need not exclude the evidence under Rule 404(b) nor 403.

17 **DATED** this 9th day of October, 2013.

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21 Gloria M. Navarro  
22 United States District Judge  
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